# REGINA v. PRITCHARD

(1972), 32 D.L.R. (3d) 617 (also reported: 9 C.C.C. (2d) 488)

Saskatchewan District Court, Bendas D.C.J., 23 October 1972

(On appeal from judgment of Saskatchewan Magistrate's Court, **supra** p.391)

**Indians -- Charge of hunting in closed season - Exemption for "Indians" - Meaning of Indian - Game Act, 1967 (Sask.), as. 12(1), 8 - Indian Act (Can.), as. 110, 2(1), 11, 12 - B.N.A. Act, 1867, a. 91(24).**

**Game and fisheries - Hunting in closed season - Exemption for "Indians" - Meaning of Indian - Game Act, 1967 (Sask.), as. 12(1), 8 -Indian Act (Can.), as. 110, 2(1), 11, 12 - B.N.A. Act, 1867, a. 91(24).**

**The term "Indian" in the Game Act, 1967 (Sask.), c. 78, exempting such persons from hunting season requirements has the same meaning as in the Indian Act, R.S.C. 1970, c. 1-6, and therefore means a person entitled to be registered as an Indian as well as a person registered as an Indian.**

**Evidence - Burden of proof of exception, excuse or qualification shifted by statute to accused - Charge of hunting in closed season -Exemption for Indians - Accused acquitted - Burden discharged by preponderance of evidence that accused an Indian - Cr. Code, a. 730 - Provincial Magistrates Act, R.S.S. 1965, c. 111, a. 15 - Game Act, 1967 (Sask.), as. 12(1), 8 -- Indian Act (Can.), as. 110, 2(1), 11, 12.**

**4Indians - Charge of hunting in closed season - Exemption for Indians - Burden of proof of exception, excuse or qualification shifted by statute to accused - Accused acquitted - Burden discharged by preponderance of evidence that accused an Indian - Cr. Code, a. 730 -Provincial Magistrates Act, R.S.S. 1965, c. 111, 9. 15 - Game Act, 1967 (Sask.), ss. 12(1), 8 - Indian Act (Can.), ss. 110, 2(1), 11, 12.**

APPEAL by the Crown by way of trial de novo from a decision of Policha, J.M.C., dismissing a charge against the accused of unlawfully hunting, deer in a closed season, contrary to s.12 (1) of the *Game Act, 1967* (Sask.).

*Norman F. Millar*, for the Crown, appellant.
*E. L. Burlingham*, for accused, respondent.

BENDAS, D.C.J.:--- This is an appeal by the Crown against the dismissal by Policha, J.M.C., of the information charging the respondent (accused) that "on the 18th of January, 1971, he did unlawfully hunt big game, to wit: deer, in a closed season, contrary to sec.12(1) [rep. & sub. 1968, c. 26, s. 3; 1970, c. 24, s.7] of *The Game Act*, S.S. 1967, c. 78". The appeal was heard by way of trial *de novo*.

The alleged offence was committed in the Baljennie District, Saskatchewan. On January 18, 1971, Conservation Officer Harry Minnifie was in the Lizzard Lake Community Pasture inspecting the land and removing game preserve signs. At about 3:45 p.m., Mr. Minnifie came upon fresh snowmobile tracks. It appeared that something had been dragged behind the machine. After following the track for about half a mile Mr. Minnifie came upon the respondent, who was sitting on a snowmobile and with a loaded gun in his hand. The carcass of a recently killed deer was attached to the rear of the machine.

When asked by Mr. Minnifie where he got the deer the respondent replied that he had shot the animal on his father's quarter nearby and that he was taking the carcass home for food for himself and his family. The respondent further stated that he was in Indian but not a Treaty Indian, and that his occupation was farming.

According to Mr. Minnifie, the Lizzard Lake Community Pasture is federal Crown land. During winter there are no people or cattle in the pasture. During the summer months farmers from the surrounding districts are allowed to graze their cattle in the pasture upon payment of certain fees.

Mr. Minnifie further testified that there was no open season "anywhere in Saskatchewan during the month of January 1971". In cross-examination the officer was unable to indicate the exact spot where the animal was killed.

The only witness called for the defence was Mr. George Pritchard, father of the respondent. In his evidence Mr. Pritchard stated that he was a North American Cree- Indian, his wife also a member of the Cree nation and that all his ancestors were Indians. During the rebellion of 1885 his father was at Frog Lake. Until about 1930 George Pritchard and his family lived at the Red Pheasant Indian Reserve. At that time he was considered a member of the Red Pheasant Indian Band. His son, Bert Pritchard, was born on the reserve. Finally, George Pritchard stated that neither his wife or his son Bert were registered Treaty Indians, but that they could be so registered

if they were to apply. Both he and the respondent had always been known as Indians. George Pritchard is presently farming in the Baljennie District. He owns seven quarters of land and rents four quarters. The respondent lives with him. On January 18, 1971, he sent Bert to shoot a deer as he needed meat for food for himself and his family. That was the evidence in this case.

Counsel for the Crown did not seriously dispute that the land where the respondent was found with the carcass was unoccupied Crown land or that he had a right of access to the land where the animal was allegedly killed. I also find that the respondent was hunting "big game" in a "closed season" as those terms are defined in the *Game Act, 1967* (Sask.), c.78

The chief argument of both counsel centred around the meaning of the term "Indian" as used in s.8 of the *Game Act, 1967*, and whether the respondent was such an "Indian".

I was unable to find any reported Canadian cases dealing with that question. In 31 C.J. at p. 480, the name "Indian" is defined as follows:

> **"Indians" is the name given by the European discoverers of America to its aboriginal inhabitants, Frazee v. Spokane County, 29 Wash. 278, 286. The term "Indian," when used in a statute without any other limitation, includes members of the aboriginal race, whether now sustaining tribal relations or otherwise: Frazee v. Spokane County, 29 Wash. 278, 286.**

In my opinion the above definition would also be valid in Canada. However, the word "Indian" as used in s.8 of the *Game Act, 1967*, has a limited meaning and it must be considered with reference to the *Indian Act*, R.S.C. 1970, c.I-6. The latter Act is a successor of a number of such enactments passed by the Parliament of Canada since Confederation. It should be noted that in all those Acts, the definition of the term Indian is essentially the same.

Those Acts were passed for the protection of the aboriginal Indian population. Prior to Confederation it was the reigning sovereign who assumed wardship over the Indians: see Norris, J.A., in *R. v. White and Bob* (1965), 50 D.L.R. (2d) 610 at pp. 637 *et seq*., 52 W.W.R. 193 [affd 52 D.L.R. (2d) 481n, [1965] S.C.R. vi]. Under s. 91(24) of the *B.N.A. Act, 1867*, the Parliament of Canada assumed exclusive legislative authority over "Indians, and Lands reserved for the Indians". By an agreement between the Government of Canada and the Province of Saskatchewan of March 20, 1930 (confirmed by 1930 (Sask.), c.87), Canada transferred its natural resources within the Province to Saskatchewan. Section 12 of said agreement provides:

> **12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access**.

The terms of the agreement were implemented by the Province when it enacted s.8 of the *Game Act, 1967.*

The section reads:

> **8(1) Notwithstanding anything in this Act, and in so far only as is necessary in order to implement the agreement between the Government of Canada and the Government of Saskatchewan ratified by chapter 87 of the Statutes of Saskatchewan, 1930, Indians within the province may hunt for food at all seasons of the year on ill unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.**
>
> **(2) For the purpose of subsection (1) the lands within game preserves, bird sanctuaries, provincial parks and wildlife management areas are deemed not to be unoccupied Crown lands or lands to which Indians have a right of access.**
>
> **(3) No person other than an Indian shall accept or have in his possession the flesh of any big game or game bird which has been taken by an Indian for food as permitted under subsection (1).**
>
> **(4) No person other than an Indian may assist, aid, hunt with or accompany any Indian hunting big game or game birds for food as permitted under subsection (1).**

Now, the term "Indian" in the said section must have the same meaning as in the *Indian Act* previously referred to. It applies to a certain group of people who have Treaty arrangements with the Government of Canada. Any other interpretation of the name "Indian", used in the said section would lead to absurdity. Should the term be given such a generic meaning then it would include Indians from the United States, temporarily visiting Canada. They have no Treaty agreements with Canada and yet they would be entitled to all the rights and privileges now enjoyed by "Indians", as defined in the Indian Act.

In this connection I would like to refer to s.110 of the *Indian Act*, which provides:

> **110. A person with respect to whom an order for enfranchisement is made under this Act shall, from the date thereof, or from the date of enfranchisement provided therein, be deemed not to be an Indian within the meaning of this Act or any other statute or law.**

The section would indicate that the term Indian, as used in the Act and, by inference as used in the *Game Act, 1967*, has a limited meaning and refers only to a certain class of people of Indian descent but does not include all descendants of the aboriginal inhabitants of Canada. That special class of people is defined in the present *Indian Act* as follows:

> **2(1) …"Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;**

In ss.11 and 12 the Act defines persons "entitled to be registered as Indians". The applicable portions of the said sections provide:

> **11(1) Subject to section 12, a person is entitled to be registered if that person**
> **(*a*) on the 26th day of May 1874 was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands*, being chapter 42 of the Statutes of Canada, 1868, as amended by section 6 of chapter 6 of the Statutes of Canada, 1869, and section 8 of chapter 21 of the Statutes of Canada, 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;**
> **(*b*) is a member of a band**
> **(i) for whose use and benefit, in common, lands have been set apart or since the 26th day of May 1874, have been agreed by treaty to be set apart, or**
> **(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;**
> **(*c*) is a male person who is a direct descendant in the male line of a male person described in paragraph (*a*) or (*b*)**
> **(*d*) is the legitimate child of**
> **(i) a male person described in paragraph (*a*) or (*b*), or**
> **(ii) a person described in paragraph (*c*) ;**
> **(*e*) is the illegitimate child of a female person described in paragraph (*a*), (*b*) or (*d*) ; or**
> **(*f*) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (*a*), (*b*), (*c*), (*d*) or (*e*).**
> **(2) Paragraph (1) (e) applies only to persons born after the 13th day of August 1956.**
> **2(1) The following persons are not entitled to be registered, namely,**
> **(*a*) a person who**
> **(i) has received or has been allotted half-breed lands or money scrip,**
> **i(ii) is a descendant of a person described in subparagraph (i).**
> **(iii) is enfranchised, or**

In his evidence John Pritchard stated that he was born on the reserve and was a member of the Red Pheasant Indian Band until he left the reserve some 30 years ago. Mr. Pritchard averred that his wife was an Indian and his son, Bert Pritchard, was born on the Red Pheasant Indian Reserve. According to Mr. Pritchard be is a direct descendant of male line of Indians and his father took part in the Rebellion of 1885. The witness further stated that he and the respondent are entitled to be registered.

There is no evidence before me that either John Pritchard or Bert Pritchard was at any time enfranchised.

Under s.730 of the *Criminal Code* the burden of proving that an exception, excuse or qualification prescribed by the law operates in favour of the defendant is on the defendant, and that the Prosecutor is not required, except by way of rebuttal, to negative the exception. By s.15 [rep. & sub. 1966, c.73, s. 1] of the *Provincial Magistrates Act*, R.S.S. 1965, c.111, provisions of the *Criminal Code* relating to summary convictions apply to provincial offences.

It is a generally accepted principle of our law that the defendant discharges the burden placed upon him by s.730 of the *Criminal Code* if he establishes, by a preponderance of evidence, that he comes within the exception. On the facts in the case at bar I have come to the conclusion that the respondent has discharged that burden. In my opinion the respondent has satisfactorily established that he is an "Indian" within the meaning of the *Game Act, 1967*, and that at the time in question he was hunting for food on the land to which he had a right of access.

I, therefore, find the respondent not guilty of the charge. The appeal will be dismissed. There will be no costs to either party.

*Appeal dismissed.*